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COURT OF CRIMINAL APPEALS
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IN THE

COURT OF CRIMINAL APPEALS

FROM THE FOURTH COURT OF APPEALS

SAN ANTONIO, TEXAS

No. 04-16-00188-CR

Petitioner PABLO ALFARO-JIMENEZ (Appellant)

v.

STATE OF TEXAS
Respondent (Appellee)

From the 186TH District Court, Bexar County Texas
HONORABLE JEFFERSON MOORE, JUDGE PRESIDING
Cause No. 2014-CR-9248

# BRIEF ON GRANTED DISCRETIONARY REVIEW

ORAL ARGUMENT REQUESTED

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## IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 38.1(a) (20), the parties to this suit are as follows:

(1) **PABLO ALFARO JIMENEZ**, is the Appellant and was the defendant in the trial court.

(2) The **STATE OF TEXAS**, by and through the Bexar County District Attorney's Office, Paul Elizondo Tower, 101 W. Nueva ST., 4th floor, San Antonio, Texas 78205, is the Appellee and prosecuted this case in the trial court.

The trial attorneys were as follows:

(1) APPELLANT was represented by **ANTHONY J. COLTON,** SBN 24064564**,** 2205 Veterans Blvd, Suite A2, Del Rio, Texas 78840, at trial and on appeal.

(2) The State of Texas was represented by **NICOLAS A. LAHOOD,** District Attorney, Paul Elizondo Tower, 101 W. Nueva ST., 4th floor, San Antonio, Texas 78205. The appellate attorneys are as follows:

(1) **PABLO ALFARO JIMENEZ** is represented by **ANGELA J. MOORE,** SBN #14320110, Tower Life Building, 310 S. St. Mary's Street, Suite 1830, San Antonio, Texas 78205, on the Petition for Discretionary Review.

(2) **NICOLAS A. LAHOOD**, District Attorney, and the District Attorney's Office, Appellate Division, San Antonio, Texas 78205, represent the State of Texas.

The trial judge was **Hon. JEFFERSON MOORE**, 186th District Court, 300 Dolorosa St., 3rd Floor, San Antonio, Texas 78205.

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## STATEMENT OF THE CASE

On April 11, 2018, The Court of criminal appeals granted appellant's Petition for discretionary review on two grounds only, Grounds 4 and 5. (Appellant will brief only those two grounds and refer to those grounds as 4 and 5, in the interest of clarity.)

## STATEMENT REGARDING ORAL ARGUMENT

The Court of Appeals reformation of Appellant's Offense and remand for a higher sentence is a misapplication of the jurisprudence of Texas allowing appellate reformation of judgment to a higher offense and outside the norm of the Rules of Appellate Procedure.

## GROUNDS GRANTED REVIEW ON APPELLANT'S PETITION

## GRANTED GROUND 4

WHETHER THE RIGHT TO A JURY TRIAL MANDATED BY U.S. CONST. SIXTH AND FOURTEENTH AMENDMENTS, AND U.S. CONST. ART. III § 2, AND THE CONCEPTS SET OUT BY THIS COURT IN *APPRENDI* AND *BLAKELY*, IS VIOLATED BY THE PROCEDURE UTILIZED BY THE COURT OF APPEALS, THAT IS, A JUDICIAL FINDING OF AN ELEMENT NOT ALLEGED IN THE INDICTMENT OR SUBMITTED TO THE JURY, WHICH IS AN UNACCEPTABLE DEPARTURE FROM THE JURY TRADITION, AN INDISPENSABLE PART OF OUR CRIMINAL JUSTICE SYSTEM, BY MAKING APPELLATE COURTS FACT FINDERS AS TO AN ELEMENT NOT CONSIDERED BY THE JURY?

## GRANTED GROUND 5

WHETHER THE RIGHT TO A JURY TRIAL AND DUE PROCESS REQUIRED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, AND *JACKSON V. VIRGINIA*, 443 U.S. 307 (1979), WAS VIOLATED WHEN THE COURT OF APPEALS REFORMED THE PETITIONER'S CONVICTION TO THE CONVICTION OF A HIGHER OFFENSE, WHEN SUCH HIGHER OFFENSE WAS NOT DETERMINED BY THE JURY, THE FACTFINDER RESULTING IN A REFORMED VERDICT WHICH WAS NOT RENDERED BY THE JURY OR THE TRIAL COURT?

## STATEMENT OF FACTS

The Appeal was timely filed. On August 2, 2017, the lower court issued an opinion in the above styled cause of action affirming the trial court's judgment in its entirety. The State filed a motion for rehearing. The State's motion for rehearing was granted. The court's opinion and judgment dated August 2, 2017 were withdrawn and this current opinion and judgment were substituted in their stead. *Alfaro-Jimenez v. State*, 04-16-00188-CR, 2017 WL 5471896, at *1 (Tex. App.—San Antonio Nov. 15, 2017, no pet. h.).

In the substitute opinion, the Court of Appeals overruled Petitioner's complaints on appeal. The Court of Appeals reformed the judgment convicting Petitioner of a more serious offense and reversed and remanded the case for a new sentencing within the third-degree FELONY range. *Alfaro-Jimenez v. State*, 04-16-00188-CR, 2017 WL 5471896.

## SUMMARY OF THE ARGUMENTS

The Fourth Court of Appeals had no authority or jurisdiction to resolve fact differences and find Petitioner guilty of a higher offense and reforming the judgment as such. The Court then brazenly remanded the case to the trial court for punishment within a higher penalty range. The Court of Appeals cited no authority for the proposition that the Court COULD do this reformation, but rather cited to case law regarding fact comparisons. The reformation by the Court of Appeals is void and the remand for resentencing is also without authority and thus a jurisdictional flaw.

## ARGUMENT AND AUTHORITIES

*STATE'S WAIVER AND FORFEITURE OF ITS RIGHT TO COMPLAIN AND ASK FOR REFORMATION OF THE JUDGMENT BY FAILING TO OBJECT AT TRIAL*

Tellingly absent in the State's Reply Brief, or in the State's Motion for Rehearing, is any mention or discussion of the State's preservation of this complaint at trial. It must be noted that the State did not object to the jury charge as written, submitted, or read to the jury. (4 RR 26). The State did not object to the verdict forms, how they were written or presented to the jury, or the jury's verdict. (4 RR 40) Moreover, the State did not object at sentencing, lodging any complaint to the offense level for which pronounced by the trial court at sentencing. (5 RR 4-5). As a result, the State's attempt

to change the outcome of the proceedings at trial through rehearing is too little and too late. (5 RR 4-5) (sentencing where trial court pronounced sentenced in open court after asking if there was no legal reason for Appellant to be sentenced to the misdemeanor offense as found by the jury.) Further, a trial court's ruling will not be reversed based on a legal theory that the complaining party did not present to it. *Hailey v. State,* 87 S.W.3d 118, 122 (Tex.Crim.App.2002). *State v. Story,* 445 S.W.3d 729, 732 (Tex.Crim.App. 2014). If the trial judge's decision is correct on any theory of law applicable to the case, it will be sustained. *Spann v. State,* 448 S.W.2d 128 (Tex.Cr.App.1969); *Moreno v. State,* 170 Tex. Crim. 410, 341 S.W.2d 455 (1961); *Calloway v. State,* 743 S.W.2d 645 (Tex.Cr.App.1988). This principle holds true even when the trial judge gives the wrong reason for his decision, *Salas v. State,* 629 S.W.2d 796 (Tex.Cr.App.1981).

The Court of Criminal Appeals has explained:

> [T]he issue is not whether the appealing party is the State or the defendant or whether the trial court's ruling is legally "correct" in every sense, but whether the complaining party on appeal brought to the trial court's attention the very complaint that party is now making on appeal. This "raise it or waive it" forfeiture rule *applies equally to goose and gander, State and defendant*. *Martinez v. State,* 91 S.W.3d 331, 336 (Tex. Crim. App. 2002)(Emphasis added). *Accord, State v. Story,* 445 S.W.3d 729, 733 (Tex. Crim. App. 2014) (where State appealed from order granting motion to suppress, it could not rely on theory not raised in trial court); *State v. Rhinehart,* 333 S.W.3d 154, 160–61 (Tex. Crim. App. 2011).

It is the appellate courts responsibility to consider whether an appellate complaint is preserved on appeal whether it is the State or the Appellant/Defendant. Language used by the Court of Criminal Appeals suggests that appellate courts have an obligation to raise and enforce the requirement of preservation of error even if the matter is not raised by the parties, and *Hughes* has been read as directing that the courts do this. "Where an appellate court fails to address issues of whether error has been preserved or forfeited by the parties, the parties may call to the court's attention such failure in a motion for rehearing. This notice gives appellate courts opportunity to examine an issue possibly overlooked, thus promoting efficiency in our legal system. Just as a trial judge has certain independent duties to perform at a trial, when she fails to perform any of those duties the parties may object. Likewise, the parties in an appellate setting may object, through a motion for rehearing, to an appellate court's failure to address systemic requirements on original submission. This objection after the fact is not unfair to one party or the other, but rather it maintains the essential integrity of our system by forcing appellate courts to observe their systemic requirements. In these instances, and in the interest of justice, the decision to grant the State's motion for rehearing is left within the sound discretion of our Court. *Hughes v. State*, 878 S.W.2d 142, 151 (Tex.Crim.App. 1992). The

Court of Appeals had the responsibility to determine if the State had preserved its complaint not by reviewing its motion for rehearing, but whether said issue was preserved in the trial court. Here there was no such discussion or objection or any attempt to bring this alleged error to the attention of the trial court. As a result, the complaint is waived and forfeited. *See State v. Story*, 445 S.W.3d 729, 733 (Tex.Crim.App.,2014). This is because the trial court never had the opportunity to rule upon it and Defendant never had a chance to rebut it, the State cannot now rely on its (forfeited theory.)

*STATE FORFEITED BY FAILURE TO BRING A CROSS POINT OF ERROR ASSERTING THE TRIAL COURT'S JUDGMENT AND SENTENCE MUST BE REFORMED BASED ON EVIDENCE PRESENTED*

Additionally, the State's complaint of the sentence and the acts for which Appellant was convicted was better suited to a cross point of error. The State did not file a notice of appeal and only responded to Appellant's other complaints. Appellant did not complain about the sentence he received as the wrong offense. As such, it is the State's burden to bring such issue in a cross point of appeal, not by piggy backing on the back of Appellant's original brief. TEX. R. APP. PRO. Provides in pertinent part:

…(b) *Cross-Points.*

(1) Judgment Notwithstanding the Verdict. When the trial court renders judgment notwithstanding the verdict on one or more

> questions, the appellee must bring forward by cross-point any issue or point that would have vitiated the verdict or that would have prevented an affirmance of the judgment if the trial court had rendered judgment on the verdict.

Failure to bring forward by cross-point an issue or point that would vitiate the verdict or prevent an affirmance of the judgment waives that complaint. *See Fisher v. Roper,* 727 S.W.2d 78, 81 (Tex.App.- San Antonio,1987). Therefore, the State has waived and forfeited it's right to complain of Appellant's sentence and offense of conviction by failing to object at trial and in addition or alternatively, failing to bring the complaint as a cross-point of error.

*THE STATUTE AND THE APPELLATE COURT'S REFORMATION OF THE JUDGMENT AND SENTENCE.*

On State's motion for rehearing the Court reversed the conviction and punishment. [1]The Court of Appeals reformed the judgment to a higher

[1] The rules of appellate procedure provide that, after an earlier motion for rehearing is decided, a further motion for rehearing may be filed within 15 days if the Court modifies its judgment, vacates its judgment and renders a new one, or issues an opinion in overruling a motion for rehearing. TEX.R.APP.P.49.5. While Appellant had an opportunity to file another rehearing or respond to the motion for rehearing initially, (Rule 49.2). Appellant declined to do so because it would have been an exercise in futility. Rather than filing a PDR outright, such a strategy would have used valuable time under which Appellant would languish in appellate orbit. It is important to note that The Court of Appeals withdrew its initial opinion, and filed its superseding opinion reversing the verdict and punishment. Petitioner argues that this act is incorrect. The second opinion must be read as an amendment of the first opinion, since both opinions must be considered to review and understand the Court's actual reasoning and holding.

offense than found by the jury. The remand for resentencing within a higher penalty range of a third-degree felony, is erroneous.

The Court found that since the State **sought** to charge Petitioner with a second-degree felony of tampering with a government record, the State had to prove that additionally, that the accused committed the offense "with the intent to defraud or harm another." *See* TEX. PENAL CODE ANN. §§ 37.10(c)(1). The Court of Appeals then reviewed the evidence, explaining that at trial the testimony focused on Alfaro-Jimenez's possession and use of the social security card as identification. But the Court went on to discuss Alfaro-Jimenez's testimony, that he did not obtain any additional benefits or use the card for any purpose other than employment. The Court then concluded *the jury could have reasonably concluded that during the commission of the offense, Alfaro-Jimenez used or presented the social security card, but that he did not intend "to defraud or harm another." Tottenham v. State*, 285 S.W.3d 19, 28 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd).

The court did not stop there. The court decided bizarrely "*However, **because the testimony clearly supported the social security card was a certificate, see Lopez, 25 S.W.3d at 929, we conclude the trial court erred in sentencing Alfaro-Jimenez's offense as a Class A misdemeanor, see Tex. Penal Code Ann. § 37.10(c)(2)(A)***

***(providing the offense is a third-degree felony if the government record is "... a license, certificate, permit, seal, title, letter of patent, or similar document issued by government, by another state, or by the United States, unless the actor's intent is to defraud or harm another, in which event the offense is a felony of the second degree*** [.]") (emphasis added).

*Alfaro-Jimenez v. State*, 04-16-00188-CR, 2017 WL 5471896, at *9 (Tex. App.—San Antonio Nov. 15, 2017, no pet. h.)

The statute found in section 37.10 of the Texas Penal Code, presents two main questions: First, is a fake social security card a government document (certificate) that can be tampered with; and secondly, based on the facts in this case, did Mr. Alfaro-Jimenez consensually "present" the social security card to the officer as required by the statute? There was no evidence at trial that the social security card found in Mr. Alfaro-Jimenez's wallet was, in fact, a *social security card* at all. The only evidence at trial was that the number on the card did not match the name on the card. There was no evidence presented as to where the card originated other than Mr. Alfaro-Jimenez's testimony that it did not come from the social security office. (4 RR 14). The direct text of Texas Penal Code § 37.10, which is the basis of this prosecution, is less than clear.

First, there are six different ways to commit the offense.

1) Make a false entry in, or false alteration of, a governmental record.

2) Make, present, or use any record, document, or thing with knowledge of its falsity.

3) Intentionally destroy, conceal, remove, or otherwise impair the verity, legibility, or availability of a governmental record.

4) Possess, sell, or offer to sell a governmental record or a blank governmental record.

5) *Make, present, or use* a governmental record with knowledge of its falsity.

*6) Possess, sell, or offer to sell a governmental record or form with knowledge that it was obtained unlawfully*.

The Jury Charge in this case states that, "A person commits an offense if the person makes, presents, or uses a governmental record with knowledge of its falsity or possesses, sells, or offers to sell a governmental record or a blank governmental record form with intent that it be used unlawfully." (CR 29). The jury charge further defined a governmental record as anything belonging to, received by, or kept by government for information, including a court record, anything required by law to be kept. [2] There is absolutely no evidence that Appellant made, presented, or used the fake social security card, and any display of the card was due to the officer's illegal seizure. Petitioner's admission that he used the card only for employment was heard by the jury and resolved in his favor.

At the most, if the Court can swallow the jagged pill that Appellant consented to the officers' search of his person and wallet,[3] the Court can surmise that the **officer pulled out** Appellant's wallet for the purpose of

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[2] It must be noted that the prosecution did not object to the written jury charge, how it was read or how the verdict forms were written and submitted to the jury.

[3] Appellant respectfully requests this Court to review the ground revolving the illegal search and seizure of Appellant's wallet from his person. See The only exception worthy of discussion in this case is consent. As mentioned above, Deputy Smith believed that appellant's answer to a question regarding the location of his identification constituted permission to retrieve that identification. The Court of Criminal Appeals has held "We find this belief to be objectively unreasonable. Appellant's response was simply an answer to the officer's question (after being handcuffed) and not a consent for the officer to search his person.
*Baldwin v. State*, 278 S.W.3d 367, 372 (Tex.Crim.App. 2009)

retrieving his identification. In no way could that be construed as making, **presenting**, or using a governmental record, much less a **"certificate."**

Section (a)(4) is unclear as it fails to delineate whether the possession has to do with selling the governmental document or if mere possession is contemplated. In Appellant's position, it would have been impossible for him to know whether or not the fake social security card he possessed was a violation of this particular statute. Nowhere in the statute does it identify a social security card, or even an identification card, as a governmental record. Thus, the statute is patently unclear and allowed Petitioner's conviction without evidence that meets the statute's basic elements.

Lastly, the Court of Appeals *sua sponte (based on the State's motion for rehearing)* found that Petitioner committed a higher offense, section 37.10 2 (C) a license, *certificate,* permit, seal, title, letter of patent, or similar document issued by government, by another state, or by the United States; TEXAS PENAL CODE § 37.01 (West). This offense was not indicted, charged to the jury, nor was the offense submitted to the jury for a finding of guilt or innocence. Nowhere in the indictment is the "certificate" offense mentioned.

The Court of Appeals had no authority to reverse the judgment of conviction and sentence to a higher-level offense and remand for a harsher sentence. Texas jurisprudence is replete with case law requiring a

reformation DOWN to a lesser included offense in a sufficiency of the evidence review. If an appellate court finds "the evidence insufficient to support an appellant's conviction for a greater-inclusive offense," the court must consider the following two questions when "deciding whether to reform the judgment to reflect a conviction for a *lesser-included offense*":

"1) in the course of convicting the appellant of the greater offense, must the jury have necessarily found every element necessary to convict the appellant for the lesser-included offense; and 2) conducting an evidentiary sufficiency analysis as though the appellant had been convicted of the lesser-included offense at trial, is there sufficient evidence to support a conviction for that offense?" *Thornton*, 425 S.W.3d at 299-300; *see also Rabb*, 483 S.W.3d at 21 (applying *Thornton* to bench trial). "If the answer to either of these questions is no, the court of appeals is not authorized to reform the judgment." *Thornton*, 425 S.W.3d at 300. "But if the answers to both are yes, the court is authorized—indeed required—to avoid the 'unjust' result of an outright acquittal by reforming the judgment to reflect a conviction for the lesser-included offense." *Id. Martinez v. State*, 524 S.W.3d 344, 348 (Tex. App.—San Antonio 2017, pet. ref'd).

***TEXAS JURISPRUDENCE DOES NOT PERMIT AN APPELLATE COURT TO REFORM THE CONVICTION FOR A <u>DIFFERENT OFFENSE</u>, WHICH IS A <u>HIGHER DEGREE OFFENSE</u>, AND REMANDING FOR A HIGHER SENTENCING RANGE***

Indeed, such an action is the appellate court acting as grand jury, prosecution and fact-finding jury. The reviewing court may not engage as fact finder under the guise of reforming a sentence, which is actually to pronounce sentence. *Harvey v. State,* 150 Tex. Crim. 332, 201 S.W.2d 42 (1947). For example, where an appellant was charged with and the jury convicted him of the offense of possession of less than 28 grams of cocaine, but the court's judgment stated that the appellant was convicted of possession of "at least 28 grams of cocaine," the appellate court agreed with the appellant and the state that the judgment should be reformed to reflect that the appellant was convicted of possession of less than 28 grams of cocaine. *Hardin v. State,* 951 S.W.2d 208 (Tex. App.-Houston 14th Dist. 1997).

First, an appellate court finding sufficient evidence to support an element of a different offense that was neither presented to the jury in the indictment nor the jury charge, is a violation of the right to a trial by jury, invoking the protections of the Sixth Amendment and the concepts set out in *Apprendi* and *Blakely*.

Second, an appellate court sitting as fact finder cannot issue a verdict the jury or the trial court could not have rendered. Under those same constitutional provisions as well as *Jackson v. Virginia,* the trier of fact

resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences from basic facts to ultimate facts, not a reviewing court. An appellate court sitting as fact finder cannot issue a verdict the jury or the trial court could not have rendered.

Even if this Court can surmise that the officer pulled out Appellant's wallet for the purpose of retrieving his identification. In no way could that be construed as making, *presenting*, or using a governmental record, much less a "certificate." During the trial, the prosecution waffled back and forth under which part of the statute they were proceeding and even the Court engaged in a guessing game as to which part of the statute would apply. (3 RR 103). The general consensus, as shown by the jury charge was to proceed under sections (a)(2) and/or (a)(4). Make, present, or use under section (a)(2) is not defined in that section. Even the jury was unclear as to what "Presenting" meant as they requested that the Court provide them with a definition, however, the Court declined to do so. (CR- 25).

Section (a)(4) is unclear as it fails to delineate whether the possession has to do with selling the governmental document or if mere possession is contemplated. In Appellant's position, it would have been impossible for him to know whether or not the social security card he possessed was a

violation of this particular statute. Nowhere in the statute does it identify a social security card, or even an identification card, as a governmental record. Thus, the statute is patently unclear and allowed Petitioner's conviction without evidence that meets the statute's basic elements.

Lastly, the Court of Appeals *sua sponte (based on the State's motion for rehearing)* found that Petitioner committed a higher offense, section 37.10 2 (C) a license, *certificate,* permit, seal, title, letter of patent, or similar document issued by government, by another state, or by the United States; TEXAS PENAL CODE § 37.01 (West). This offense was not indicted, charged to the jury, nor was the offense submitted to the jury for a finding of guilt or innocence. Nowhere in the indictment is the "certificate" offense mentioned.

Texas jurisprudence is replete with case law requiring a reformation DOWN to a lesser included offense in a sufficiency of the evidence review. If an appellate court finds "the evidence insufficient to support an appellant's conviction for a greater-inclusive offense," the court must consider the following two questions when "deciding whether to reform the judgment to reflect a conviction for a *lesser-included offense*":

"1) in the course of convicting the appellant of the greater offense, must the jury have necessarily found every element necessary to convict the appellant for the lesser-included offense; and 2) conducting an evidentiary sufficiency

analysis as though the appellant had been convicted of the lesser-included offense at trial, is there sufficient evidence to support a conviction for that offense?" *Thornton*, 425 S.W.3d at 299-300; *see also Rabb*, 483 S.W.3d at 21 (applying *Thornton* to bench trial). "If the answer to either of these questions is no, the court of appeals is not authorized to reform the judgment." *Thornton*, 425 S.W.3d at 300. "But if the answers to both are yes, the court is authorized—indeed required—to avoid the 'unjust' result of an outright acquittal by reforming the judgment to reflect a conviction for the lesser-included offense." *Id. Martinez v. State*, 524 S.W.3d 344, 348 (Tex. App.—San Antonio 2017, pet. ref'd).

Appellant was convicted of tampering with a governmental record. *See* Verdict form. (CR 37). This is supported by Paragraph II of the indictment. (CR 4). Here, Appellant's conviction by the trial court was changed by the appellate court to a higher offense for which Appellant was not convicted. However, case law does not permit an appellate court to reform the conviction for a different offense, which is a higher degree offense, and remanding for a higher sentencing range. Indeed, such an action is the appellate court acting as grand jury, prosecution and fact-finding jury. The reviewing court may not, under the guise of reforming a sentence, which is actually to pronounce sentence. *Harvey v. State,* 150 Tex. Crim. 332, 201

S.W.2d 42 (1947). For example, where an appellant was charged with and the jury convicted him of the offense of possession of less than 28 grams of cocaine, but the court's judgment stated that the appellant was convicted of possession of "at least 28 grams of cocaine," the appellate court agreed with the appellant and the state that the judgment should be reformed to reflect that the appellant was convicted of possession of less than 28 grams of cocaine. *Hardin v. State,* 951 S.W.2d 208 (Tex. App.-Houston [14th Dist.] 1997). The higher offense was not even part of the petit jury's determination and resolution. The jury charge and verdict clearly match the judgment and reflects the conviction of the lesser included offense (CR 4, indictment) and not the greater. (CR-37). Indeed, the jury note asking for clarification, "what does presenting mean?" (CR-25) show the jury did not find that element and opted for the lower offense. It is for these reasons oral argument is necessary to correct and prevent this abuse of power and lack of authority.

The Court of Appeals found the State had to prove that additionally, that the accused committed the offense "with the intent to defraud or harm another." *See* TEX. PENAL CODE ANN. §§ 37.10(c)(1). The intent to defraud or harm another was not part of the verdict.

Thus, post-*Bowen,* courts of appeals are no longer permitted to base their decisions whether to **reform** a **judgment** of conviction on either of

these considerations. The focus is now on the evidence presented and the lesser-included conviction sought, rather than the parties' respective strategies in failing—or deciding whether—to seek an instruction at trial. As appellate counsel has raised before in the Bowen case, the Court's discussion and holding completely eviscerates the concepts of lesser included offenses, requirement of lesser included offenses, and allows the State to stand mute and see the judicial process, especially the jury verdict, to work for the benefit of the defendant. Then on appeal by one motion, the State wins. This is another form of overreaching, where no matter what mistake the State makes, the Government always wins. *Bowen* is a blight on Texas Jurisprudence. *Bowen v. State,* 374 S.W.3d 427, 432 (Tex.Crim.App.2012).

Nevertheless, even in light of Bowen, here the Court of appeals erred in reforming Appellant's offense of conviction to a higher-level offense for which he was acquitted and speculating on what the jury thought and could have found. Such appellate gymnastics deprives Appellant his right to a jury verdict by a unanimous verdict and allows the Appellate courts to stand in as a fact finder. As a result, Appellant's conviction must be reversed, and an acquittal entered. Alternatively, the Court of Appeal's holding must be reversed and Appellant's conviction and sentence to stand as found by the jury and pronounced by the trial court.

## CONCLUSION AND PRAYER

Petitioner requests that this Honorable Court hold the social security card was illegally seized, was never displayed or used to the officers and there is no evidence that the card was ever used with the intent to harm or defraud. Indeed, there is no testimony that the card seized from Petitioner was a false Social Security card. The case must result in an acquittal. Petitioner requests that this case be reversed and rendered. The courts of appeals and the court of criminal appeals may reverse the trial court's judgment and remand the case for further proceedings. TEX. R. APP. P. 78.1(d) (Court of Criminal Appeals-CCA). When reversing the court of appeals' judgment, the CCA may, in the interests of justice, remand the case to the trial court even if a rendition of judgment is otherwise appropriate. TEX. R. APP. P. 78.2. Petitioner requests such a remand as an alternative to an acquittal, if necessary, without the illegally seized evidence. Or, as an alternative, this Court must affirm Appellant's conviction as entered at the trial court.

WHEREFORE, PRESMISES CONSIDERED, the Appellant submits that the judgment of the court of appeals should, in all things, be REVERSED and alternatively Appellant must be acquitted.

Respectfully submitted,

/s/ Angela J. Moore
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## CERTIFICATE OF COMPLIANCE

I, Angela J. Moore, Attorney for Petitioner, hereby certifies that this Petition for Discretionary Review, is within the 4500-word limitation described in Rule 9.4(i)(2)(D) of the Texas Rules of Appellate Procedure having 4,420 computer generated words excluding the portions specifically excepted by the above cited rule.

/s/ Angela J. Moore
ANGELA J. MOORE

## CERTIFICATE OF SERVICE

I, Angela J. Moore, Attorney for Petitioner, hereby certifies that a true and correct copy of the above and forgoing brief was served via e-filing to the Bexar County District Attorney's Office on or about May 29, 2018.

/s/ Angela J. Moore
ANGELA J. MOORE